IN THE

Supreme Court of the United States

October Term, 1950

No. 438

UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA, CIO, ARTHUR ST. JOHN, THOMAS LANSING, AL FUHRMAN,

Petitioners

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C.I.O., Arthur St. John, Chester Walczak and Thomas Lansing pray that a writ of certiorari issue to review the decision of the Supreme Court of Wisconsin, entered on November 8, 1950, affirming the judgment of the Circuit Court of Milwaukee County which found the petitioners guilty of contempt of court and fined them $250.00 each.

OPINION BELOW

The opinion of the Supreme Court of Wisconsin, a copy of which is appended hereto as Appendix A, has not yet been reported.

JURISDICTION

The mandate of the Supreme Court of Wisconsin, affirming the Circuit Court of Milwaukee County, was entered on November 8, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3). The petitioners were adjudged

guilty of contempt of Court for failing to obey a temporary restraining order issued *ex parte* by the Circuit Court of Milwaukee County commanding the petitioners to take immediate steps to end a strike. The injunction was issued at the request of the Wisconsin Employment Relations Board on a compiaint filed by it under the terms and the authority of Section 111.63, Wisconsin Statutes 1947. The petitioners contended at all times that no injunction could constitutionally have been issued under said section and that there could, therefore, be no finding of contempt, since the section and the chapter of which it is a part was unconstitutional and void as a violation of due process and because of its conflict with the Labor Management Relations Act, 1947, 29 U.S.C. 141-197. This contention was rejected by the trial court on the ground that the issue was *res judicata* between the parties. On appeal, the Supreme Court of Wisconsin dealt with the petitioners' contention on its merits, without mention of *res judicata*, and held the Wisconsin statute to be constitutional as applied in the instant case. The petitioners ask that this Court review, by certiorari, the decision of the Wisconsin Supreme Court on the Federal questions thus presented to and decided by the Supreme Court of Wisconsin.

QUESTIONS PRESENTED

Does subchapter III of Chapter 111 of Wisconsin Statutes, 1947, violate the 13th and 14th Amendments to the Constitution of the United States?

Is subchapter III of Chapter 111 unconstitutional because in conflict with the Labor Management Relations Act, 1947 and the public policy expressed therein?

STATUTES INVOLVED

The provisions of Subchapter III, Chapter 111, Wisconsin Statutes, 1947 (Vol. 1, page 1896) are set forth in Appendix B hereto. This subchapter provides, in short, that public utility employers in the State of Wisconsin and their employees shall have a duty (a) to exert every reasonable effort to settle labor disputes by making agreements through collective bargaining and by maintaining such agreements and (b) to prevent the collective bargaining process from reaching an im-

passe. (Section 111.52) If, despite these provisions, an impasse is reached provisions are made for the appointment of conciliators, and if conciliation fails, of arbitrators. (Sections 111.54-55) Such arbitrators are given power to make awards binding on the parties. (Section 111.59) Strikes are absolutely forbidden. (Section 111.62) The Wisconsin Employment Relations Board is given the responsibility of enforcing the subchapter and is authorized to bring action in a Wisconsin circuit court to compel performance of the duties imposed by it. (Section 111.63)

STATEMENT

This case arises out of the very same facts as are involved in *St. John et al.* v. *Wisconsin Employment Relations Board*, No. 302, October Term 1950, probable jurisdiction noted, October 23, 1950. The parties and the issues are substantially the same. The background and relationship of the two cases are as follows:

The petitioners herein are Local 18 of the United Gas, Coke and Chemical Workers of America (hereafter referred to as the Union) and several of its officers. On August 1st, 1943, the Union was certified by the National Labor Relations Board as the exclusive bargaining agent for the production and maintenance employees of the Milwaukee Gas Light Company (hereafter referred to as the Company). (Record, No. 302, p. 38)[1] The collective bargaining agreement between the Company and the Union expired on June 1st, 1949 (R. 302, p. 38). Upon its expiration, the Federal Mediation and Conciliation Service, acting pursuant to the Labor Management Relations Act, intervened and attempted to assist in the negotiations for

[1] As indicated in the motion to dispense with the printing of the record, submitted herewith, the certified record in this case was received too late to permit submission of a printed record on consideration of the petition for certiorari Accordingly, counsel for petitioners have submitted as a separate Appendix C to this petition, copies of the petitioners' brief in the Supreme Court of Wisconsin. This brief contains, in an appendix, the pleadings in the Circuit Court, the decision and judgment of that Court, and all other portions of the record relevant to the consideration of the constitutional issues raised herein. References to this Appendix will be made as "App. p. ....." The record in No. 302, covering as it does the same facts, will be referred to herein as "R. 302, p. ....."

a new contract. Thereafter, on September 19, 1950, the Union filed charges with the National Labor Relations Board, charging that the Company had violated the Labor-Management Relations Act by refusing to bargain collectively with the Union. Such charges were pending before the NLRB during all of the proceedings below. Subsequent to the filing of charges, there were negotiations between the parties but no agreement was reached.

At 6 A.M. on October 5th, 1950, the employees of the Company went on strike. At about 11 A.M. of the same day the Wisconsin Employment Relations Board, acting under the provisions of subchapter III, Chapter 111, Wisconsin Statutes 1947, filed a complaint (App., p. 122) charging (a) that the Company had failed and neglected to exert every reasonable effort to settle the dispute by collective bargaining and (b) that the officials of the Union had voted to call a strike and had, in fact, called a strike and established a picket line. The Board alleged that both the Company and the Union were thus acting in violation of subchapter III [1] and that the Board was charged with the enforcement of compliance with that chapter. It asked for an injunction against both the Company and the Union. An *ex parte* temporary restraining order was issued against the Company and the Union and served upon some of the petitioners at about 2 P.M. Thereafter, a conference was arranged between the Company and the Union, which continued throughout the night of October 5th. At about 8 A.M. the next morning an agreement was reached, a contract was signed and the strike was terminated. (App., p. 116.)

On October 18th, 1950, the petitioners herein, and others, filed a complaint, now before this Court in No. 302, in the federal District Court for the Eastern District of Wisconsin. The complaint alleged that various punishments were threatened by virtue of the facts above set forth, including contempt cita-

[1] The Company was alleged to be violating Sec. 111.52 by failing to take every reasonable effort "to prevent the collective bargaining process from reaching a state of impasse." The Union was alleged to be violating Sec. 111.62 by instigating, inducing, etc., a strike which caused interruption of an essential service.

tions and criminal action against the Union and its officers (R. 302, p. 7). It asked the Court to enjoin any proceedings against the petitioners on the ground that the Wisconsin statute under which such action was threatened was unconstitutional and void.

As the Court is aware, the federal District Court—a three-judge court—refused the relief requested and dismissed the complaint on the theory that a prior litigation in the Wisconsin Courts in which some of the petitioners herein were parties, *United Gas, Coke and Chemical Workers* v. *Wisconsin Employment Relations Board*, 255 Wis. 154, precluded the petitioners from again raising the constitutional issues (R. 302, p. 59). One judge dissented from the holding on the issue of *res judicata*. The constitutional issues were not reached. An appeal was taken to this Court and probable jurisdiction was noted on October 23, 1950.

Meanwhile, the Wisconsin Employment Relations Board had petitioned the Circuit Court of Milwaukee County to issue an order to show cause why the petitioners should not be adjudged guilty of contempt for failing to call off the strike immediately upon issuance of the temporary restraining order (App. p. 166). On October 10, 1949, such an order was issued (App. p. 164). The petitioners raised the same constitutional objections which they sought to raise in the federal District Court (App. p. 134). The result was the same. The Circuit Court held, as did the federal District Court, that those issues were *res judicata* by virtue of the prior decision of the Wisconsin Supreme Court. On March 14, 1950, it found petitioners guilty of contempt and fined them $250.00 each (App. p. 101).

The petitioners appealed to the Wisconsin Supreme Court. They argued that the prior litigation did not constitute *res judicata* on the constitutional issues and argued those issues on the merits. The Wisconsin Supreme Court—the very Court whose prior judgment had been urged to constitute *res judicata*—apparently did not so regard its judgment. It dealt with the Federal issues on their merits. On November 8, 1950, it held that the petitioners contentions on the merits

were unsound and that the Wisconsin statute, as applied, did not conflict with Federal law. It is this decision which is sought to be reviewed herein.

REASONS FOR GRANTING THE WRIT

1. The proceedings involved here are the very proceedings which were sought to be enjoined in the federal District Court in the case which is now before this Court on appeal in No. 302. The facts are the same as in No. 302. The parties are, for the most part, the same.* The substantive constitutional issues are the same.

There is only one significant difference. The false issue of *res judicata* is not present in this case. The Wisconsin Supreme Court was urged strongly to uphold the ruling of the Circuit Court of Milwaukee County that the petitioners were barred by the prior decision of the Wisconsin Supreme Court from contesting the constitutionality of the Wisconsin statute. The Wisconsin Court, however, refused to adopt that position. It noted its prior decision on the general constitutionality of the Act and then dealt on the merits with the constitutional contentions of the petitioners in this case. It affirmed the finding of contempt because it found that the Wisconsin statute under which the restraining order had been issued was not in conflict with federal legislation and, hence, was valid and effective.

This Court now has No. 302 before it. If the Court in No. 302 should reverse—as it should—the ruling of the District Court on the *res judicata* issue, the substantive constitutional issues would remain. Those issues are presented identically by the present case. A grant of certiorari in this case would enable the Court to reach directly the substantive and important constitutional issues which are posed only secondarily in No. 302.

2. A grant of certiorari in this case would also permit this Court to review directly the considered decision of the Wisconsin Supreme Court as to the effect of the decision in *Auto-*

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*All of the petitioners herein are appellants in No. 302. Some of the appellants in No. 302 were not adjudged guilty of contempt and hence are not parties to this petition.

mobile Workers v. *O'Brien*, 339 U.S. 454, upon the constitutionality of the Wisconsin public utility anti-strike law. That statute is before the Court not only in No. 302 but also in *Amalgamated Association*, etc. v. *Wisconsin Employment Relations Board*. Nos. 329 and 330, certiorari granted November 6, 1950. The latter cases involve the same issues—although in different context—as those presented in No. 302 and in this case. The decisions of the Wisconsin Supreme Court in Nos. 329 and 330, however, predated the *O'Brien* opinion. Hence, the decisions in the present case, and only the decision in this present case, presents squarely for review a decision of the Wisconsin Supreme Court made in the light of and with consideration given to the opinion of this Court in the *O'Brien* case.[4]

3. The record in this case makes startlingly apparent the extent to which the Wisconsin statute and the Labor-Management Relations Act, 1947, overlap and conflict. The Wisconsin statute is a comprehensive statute governing labor-management relations in public utilities. In Section 111.52 it imposes a duty upon public utility employers and their employees to make every reasonable effort to settle labor disputes by collective bargaining. This statutory command is enforceable by injunction and was, in fact, enforced against the Company by the restraining order issued in this case.

We thus have a complete overlapping of the Federal statute. The Labor-Management Relations Act, 1947, imposes both upon unions and employers the duty to bargain collectively. It provides machinery for the adjudication of charges that this duty has not been performed and it provides a mechanism for enforcing such adjudications. The Wisconsin statute, wholly independently, prescribes a similar duty and a wholly different mechanism for adjudication and enforcement. We thus have the very real possibility, not only of dual enforcement of the same obligation, but also of contradictory adjudi-

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[4] The statement in the opinion of the Wisconsin Supreme Court that the court had considered the *O'Brien* case on motion for rehearing in *United G., C. & C. Workers* v. *Wis. E. R. Board*, is an obvious oversight. The Gas, Coke & Chemical Workers case was decided on July 12, 1949. No motion for rehearing was filed. The *O'Brien* case was decided by this court on May 8, 1950.

cations as to whether a company or a union have complied with the duty to bargain collectively.

This potential conflict is made clear in the present case. Here we had a complaint filed by the Union with the National Labor Relations Board, and pending before it, which charged the Company with a refusal to bargain collectively. We also had a complaint, on which an injunction issued, filed by the Wisconsin Employment Relations Board in a Wisconsin Court, charging that the Company failed to make every reasonable effort to settle the dispute with the Union by collective bargaining. The possibilities of conflict in these contemporaneous and independent proceedings are manifest.

4. The issue of *res judicata* in No. 302 is, as shown by the decision of the Wisconsin Supreme Court in this case, a false issue. But there exists a very real possibility that a substantial issue of *res judicata* would be created if this Court should deny certiorari in this case and should ultimately hold, in the other cases before it, that the Wisconsin statute is void. A final decision now having been made against the petitioners in the Wisconsin Courts, they would thereafter be precluded from contesting the validity of the Wisconsin statute and of their contempt citations if this case is not accepted for review.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for certiorari should be granted and that this case should be set for argument with No. 302 and Nos. 329-330.

Respectfully submitted,

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APPENDIX A.

Wisconsin Statutes.

SUBCHAPTER III.

Public Utilities.

111.50 *Declaration of Policy.* It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employees which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employees, and to provide settlement procedures for labor disputes between public utility employers and their employees in cases where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare.

111.51 *Definitions.* When used in this subchapter:

(1) "Public utility employer" means any employer (other than the state or any political subdivision thereof) engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state. This subchapter does not apply to railroads nor railroad employees.

(2) "Essential service" means furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state.

(3) "Collective bargaining" means collective bargaining of or similar to the kind provided for by subchapter I of this chapter.

(4) "Board" means the Wisconsin Employment Relations Board.

(5) "Arbitrators" refers to the arbitrators provided for in this subchapter.

111.52 *Settlement of Labor Disputes Through Collective Bargaining and Arbitration.* It shall be the duty of public utility employers and their employees in public utility operations to exert every reasonable effort to settle labor disputes by the making of agreements through collective bargaining between the parties, and by maintaining the agreements when made, and to prevent, if possible, the collective bargaining process from reaching a state of impasse and stalemate.

111.53 *Appointment of Conciliators and Arbitrators.* Within 30 days after this subchapter becomes effective, the board shall appoint a panel of persons to serve as conciliators or arbitrators under the provisions of this subchapter. No person shall serve as a conciliator and arbitrator in the same dispute. Each person appointed to said panels shall be a resident of this state, possessing in the judgment of the board, the requisite experience and judgment to qualify such person capably and fairly to deal with labor dispute problems. All such appointments shall be made without a consideration of the political affiliations of the appointee. Each appointee shall take an oath to perform honestly and to the best of his ability the duties of conciliator or arbitrator, as the case may be. Any appointee may be removed by the board at any time or may resign his position at any time by notice in writing to the board. Any vacancy in the panels shall be filled by the board within 30 days after such vacancy occurs. Such conciliators and arbitrators shall be paid reasonable compensation for services and for necessary expenses, in an amount to be fixed by the board, such compensation and expenses to be paid out of the appropriation made to the board by section 20.585 upon such authorizations as the board may prescribe.

111.54 *Conciliation.* If in any case of a labor dispute between a public utility employer and its employees, the collective bargaining process reaches an impasse and stalemate, with the result that the employer and the employees are unable to effect a settlement thereof, then either party to the dispute may petition the board to appoint a conciliator from the panel, provided for by section 111.53. Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. The conciliator so named shall expeditiously meet with the disputing parties and shall exert every reasonable effort to effect a prompt settlement of the dispute.

111.55 *Conciliator Unable to Effect Settlement; Appointment of Arbitrators.* If the conciliator so named is unable to effect a settlement, of such dispute within a 15-day period after his appointment, he shall report such fact to the board; and the board, if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 3 or 5 persons from the panel provided for in section 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the board as the arbitrator (or arbitrators) to hear and determine such dispute.

111.56 *Status Quo to Be Maintained.* During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action of either party without the consent of the other.

111.57 *Arbitrator to Hold Hearings.* (1) The arbitrator shall promptly hold hearings and shall have the power to administer oaths and compel the attendance of witnesses and the furnishing by the parties of such information as may be necessary to a determination of the issue or issues in dispute.

Both parties to the dispute shall have the opportunity to be present at the hearing, both personally and by counsel, and to present such oral and documentary evidence as the arbitrator shall deem relevant to the issue or issues in controversy.

(2) It shall be the duty of the arbitrator to make written findings of fact, and to promulgate a written decision and order, upon the issue or issues presented in each case. In making such findings the arbitrator shall consider only the evidence in the record. When a valid contract is in effect defining the rights, duties and liabilities of the parties with respect to any matter in dispute, the arbitrators shall have power only to determine the proper interpretation and application of contract provisions which are involved.

(3) Where there is no contract between the parties, or where there is a contract but the parties have begun negotiations looking to a new contract or amendment of the existing contract, and wage rates or other conditions of employment under the proposed new or amended contract are in dispute, the factors, among others, to be given weight by the arbitrator in arriving at decision, shall include:

(a) Comparison of wage rates or other conditions of employment of the utility in question with prevailing wage rates or other conditions of employment in the local operating area involved:

(b) Comparison of wage rates or other working conditions with wage rates or other working conditions maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions in the local operating area involved;

(c) The value of the service to the consumer in the local operating area involved;

(d) Where a public utility employer has more than one plant or office and some or all of such plurality of plants or offices are found by the arbitrator to be located in separate areas with different characteristics, consideration shall be given to the establishment of separate wage rates or schedule of wage rates and separate conditions of employment for plants and offices in different areas;

(e) The over-all compensation presently received by the em-

ployees having regard not only to wages for time actually worked but also to wages for time not worked, including (without limiting the generality of the foregoing) vacation, holidays, and other excused time, and all benefits received, including insurance and pensions, medical and hospitalization benefits and the continuity and stability of employment enjoyed by the employees. The foregoing enumeration of factors shall not be construed as precluding the arbitrator from taking into consideration other factors not confined to the local labor market area which are normally or traditionally taken into consideration in the determination of wages, hours and working conditions through voluntary collective bargaining or arbitration between the parties.

111.58 *Standards for Arbitration.* The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union.

111.59 *Filing of Order With Clerk of Circuit Court; Period Effective; Retroactivity.* The arbitrator shall hand down his findings, decision and order (hereinafter referred to as the order) within 30 days after his appointment; except that the parties may agree to extend, or the board may for good cause extend the period for not to exceed an additional 30 days. If the arbitrators do not agree, then the decision of the majority shall constitute the order in the case. The arbitrator shall furnish to each of the parties and to the public service commission a copy of the order. A certified copy thereof shall be filed in the office of the clerk of the circuit of the county wherein the dispute arose or where the majority of the employees involved in the dispute reside. Unless such order is reversed upon a petition for review filed pursuant to the provisions of section 111.60, such order, together with such agreements as the parties may themselves have reached, shall become binding upon, and shall control the relationship between the parties from the date such order is filed with the clerk of the circuit court, as aforesaid, and shall continue effective for one year from that date, but such order may be changed by mutual consent or agreement of the parties. No order of the arbitrators relating to wages or rates of pay

shall be retroactive to a date before the date of the termination of any contract which may have existed between the parties, or, if there was no such contract, to a date before the day on which the demands involved in the dispute were presented to the other party. The question whether or not new contract provisions or amendments to an existing contract are retroactive to the terminating date of a present contract, amendments or part thereof, shall be a matter for collective bargaining or decision by the arbitrator.

111.60 *Judicial Review of Order of Arbitrator.* Either party to the dispute may within 15 days from the date such order is filed with the clerk of the court, petition the court for a review of such order on the ground (1) that the parties were not given reasonable opportunity to be heard, or (2) that the arbitrator exceeded his powers, or (3) that the order is not supported by the evidence, or (4) that the order was procured by fraud, collusion, or other unlawful means. A summons to the other party to the dispute shall be issued as provided by law in other civil cases; and either party shall have the same rights to a change of venue from the county, or to a change of judge, as provided by law in other civil cases. The judge of the circuit court shall review the order solely upon the grounds for review herein above set forth and shall affirm, reverse, modify or remand such order to the arbitrator as to any issue or issues for such further action as the circumstances require.

111.61. *Board to Establish Rules.* The board shall establish appropriate rules and regulations to govern the conduct of conciliation and arbitration proceedings under this subchapter.

111.62 *Strikes, Work Stoppages, Slowdowns, Lockouts, Unlawful; Penalty.* It shall be unlawful for any group of employees of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employees when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to

conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employees acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor.

111.63 *Enforcement.* The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply.

111.64 *Construction.* (a) Nothing in this subchapter shall be construed to require any individual employee to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employee to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employees of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employees, where such acts would cause an interruption of essential service.

(b) All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter.

111.65 *Separability.* It is hereby declared to be the legislative intent that if any provision of this subchapter, or the application thereof to any person or circumstance is held invalid, the remainder of the subchapter and the application of such provisions to persons or circumstances other than those as to which it is held invalid shall not be affected thereof.

APPENDIX B

No. 66

August Term, 1950

STATE OF WISCONSIN: IN SUPREME COURT

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent and Appellant

v.

MILWAUKEE GAS LIGHT CO., et al,

Defendants

UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA, et al,

Appellants and Respondents

APPEAL from a judgment of the Circuit Court for Milwaukee County: Otto H. Breidenbach, Circuit Judge. ***Affirmed.***

This is an appeal from a judgment, entered April 19, 1950, adjudging the defendants, United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C.I.O. (hereinafter referred to as Union), Arthur St. John Thomas Lansing, and Alvin C. Fuhrman, guilty of contempt for violation of an order entered October 5, 1949, and imposing a fine of $250 as to each; and the plaintiff Wisconsin Employment Relations Board, cross-appeals from that portion of the judgment adjudging Chester Walczak and thirteen other persons not guilty of contempt for violation of the October 5, 1949 order.

This action was begun by the Wisconsin Employment Relations Board (hereinafter referred to as Board) on October 5, 1949, to enforce the provisions of subch. III of ch. 111, Stats., known as the public utility anti-strike law.

On October 5, 1949, the circuit court for Milwaukee county entered an order requiring the defendants to show cause on October 7, 1949, why temporary relief asked by the Board should not be granted, and directing the Union, St. John, Walczak, and Lansing, pending the hearing, "to absolutely desist and refrain from calling a strike, going out on strike or causing any work stoppage or slowdown which would cause an interruption of the service of the Milwaukee Gas Light Company or the Milwaukee Solvay Coke Company and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause interruption of such service, and from picketing or causing to be picketed the premises of the Milwaukee Solvay Coke Company (a subsidiary supplying gas)." It was further ordered that the Union, St. John, Walczak, and Lansing "take immediate steps to notify all employees called out on strike to resume service forthwith."

On October 7, 1949, the parties appeared pursuant to the order of October 5, 1949, and then stipulated "that the temporary restraining order should be continued until the final disposition of the issues upon their merits."

On petition of the Board, an order was entered on October 10, 1949, requiring the Union, the individual defendants, and certain members of the Union, including Alvin C. Fuhrman, to show cause on October 24, 1949, why they should not be punished as and for a civil contempt in failing to obey and in disobeying the order of October 5, 1949.

After trial the aforesaid judgment was entered. The Trial court in its decision, findings of fact, conclusions of law, and judgment found Thomas Lansing to be in contempt. However, through inadvertence, the judgment also provided that the petition of the Board as to Thomas Lansing be dismissed. He has appealed herein and therefore has considered himself as having been found in contempt. The inconsistency in the judgment was recognized by all parties as an error.

Other material facts will be stated in the opinion.

MARTIN, J. Prior to October 5, 1949, the membership of the Union had authorized the negotiating committee to call a

strike and on October 4, 1949, the negotiating committee, consisting of defendants, Arthur St. John, Thomas Lansing, and Alvin C. Fuhrman, ordered the strike to commence at 6:00 A.M., October 5, 1949.

At 11:00 A.M., the public was advised to curtail consumption of gas and an appeal to consumers of gas was made to shut off the service; the steam pressure dropped to zero in the boiler room and no further pumping could be done with the main pumping facilities; the fires had to be pulled from the boilers reducing the steam pressure, and all facilities had to be stopped; a minimum pressure in the distribution system was kept in order that the air would not get into the mains so as to prevent any explosions due to the mixture of gas and air in the distribution system; the sendouts dropped to twenty-five per cent of what they had been previously. Low pressure in the system created a dangerous condition fraught with the possibility of infinite injury to the public. The public was advised by radio broadcasts and through the newspapers to shut off appliances and to shut off the service at the meter. The service was not resumed until October 6, 1949.

The restraining order was signed by the court at 12:55 P.M., and was served by the deputy sheriff upon the union, by serving its president, Arthur St. John, and upon him personally, and upon Chester Walczak, international representative, at a meeting of a large group of the members of the Union at Bohemian hall, at about 2:00 P.M., October 5th. Chester Walczak and Arthur St. John told the meeting the papers served were an order to go back to work, but no statement was made calling the men back to work.

A picket line was maintained at the premises of the Coke Company from 2:00 or 3:00 P.M. and continued there until about 9:30 P.M., on Wednesday, October 5, 1949.

The Coke Company is a wholly owned subsidiary of the Gas Company. In October, 1949, the Coke Company supplied about fifty-five to sixty per cent of the gas distributed by the Gas Company. Because of the relationship between the Coke Company and the Gas Company, the Coke Company is a public utility employer and the public utility anti-strike law applies to it.

The present proceeding does not relate back to the action of the Union voting the strike, or to the act of the negotiating committee calling the strike. It relates to matters occurring subsequent to the signing of the order and the service of same at about 2:00 P.M., on October 5th.

The order required the Union, St. John, Walczak, and Lansing to "take immediate steps to notify all employees called out on strike to resume service forthwith." Because of the seriousness of the situation already referred to resulting from the partial or complete stoppage of the essential service of furnishing gas to the public, the order required immediate compliance.

On Arthur St. John, president of the Union, a member of the executive board and of the negotiating committee, Thomas Lansing, a member of the executive board and the negotiating committee, and Alvin C. Fuhrman, vice-president of the Union and a member of the executive board and negotiating committee, was placed the responsibility by vote of the Union to call the strike and upon them rested the responsibility, after the service of the restraining order, to revoke the call and comply with the order of the court.

An all-night conference between Union and Gas Company officials, in which the mayor of Milwaukee and the judge of the United States district court of the eastern district of Wisconsin participated, was held on October 5th and an agreement was reached. The strike ended at 8:00 A.M., October 6th. The defendants contend that a call to the members of the Union to return to work would have been ineffectual; that they knew beyond any reasonable doubt that any order, request, or recommendation of theirs would, under the circumstances then existing, have no effect whatever in getting the men back to work. They assert that there was no contumacious or wilful disobedience of the order because they immediately took action and arranged a conference in which the strike was settled, and there was only a few hours' delay in achieving the main objective of the order, which was to end the strike and get the production of gas and its distribution to consumers back to normal. These measures are not a justifi-

cation for their failure to comply with the requirements of the court order.

It is true that within twenty hours the strike was settled by negotiations. However successful the negotiations may have been, it does not purge the defendants. The language of the court order is direct and unambiguous. It commanded something be done—"take immediate steps to notify all employees called out on strike to resume service forthwith." This the defendants ignored.

The acts complained of which violated the injunction constituted contempt of court and are held to have injured the Board. See *Wisconsin E. R. Board* v. *Allis-Chalmers W. Union* (1946). 249 Wis. 590, 25 N.W. (2d) 425.

Defendant Chester Walczak at the time in question was a regional director of the international union, but he was not a member of the negotiating committee. The immediate duty to recall the strike did not rest upon him as it did upon the members of the negotiating committee. It does not appear that his failure to disassociate himself from the continuance of the strike was an act of wilful and contumacious civil contempt.

We have carefully reviewed the evidence relating to the other thirteen union members who were dismissed in this action. No useful purpose would be served in discussing each individually. They were either present at the meeting at the Bohemian hall or in the picket line at the Coke Company when the court order was served. The evidence does not so clearly and sufficiently establish their knowledge of the scope and requirements of this order so as to overrule the finding of the trial court. The members of the negotiating committee did not sufficiently inform them of the requirements. This finding by the trial court is a reasonable deduction from the testimony produced and must stand. The court's finding is of great weight. Its conclusion after seeing the witnesses and hearing their testimony cannot be disturbed.

The Union asserts that subchapter III of chapter 111, Stats., conflicts with the Federal Labor Management Relations Act of 1947, and violates the state and federal constitutions.

The constitutionality of the public utility anti-strike law was questioned in a previous action in the court. *United G., C. & C. Workers* v. *Wis. E. R. Board* (1949), 255 Wis. 154, 38 N. W. (2d) 692. The law has been held to be a proper legislative enactment.

The Union relies on *International Union of U.A.A. & A.* v. *O'Brien* (1950), 339 U. S. 454, 94 L. ed. 659 (Adv. Op.) [same case below, 325 Mich. 250, 38 N.W. (2d) 421] wherein the constitutionality of the strike vote provision of the Michigan labor mediation law was before the court. The appellants struck against the Chrysler corporation in May, 1948, without conforming to the prescribed state procedure. The United States Supreme Court stated that even if some state legislation in this area could be sustained, the particular statute before it could not stand for it conflicts with the federal act. It was explicitly pointed out that Congress had considered in enacting the federal act, and expressly rejected, on its merits, the proposition that a strike vote ought to be prerequisite of a strike.

The lower court considered that the state police power could operate even though some of the members of the same bargaining unit were employed in Chrysler plants in California and Indiana, as well as Michigan. The United States Supreme Court, is bound by the state court's interpretation of the state statute. As so interpreted, it was held that the Michigan provision conflicted with the exercise of federally protected labor rights. The court said that the regulation of the right to peacefully strike for higher wages had been preempted by Congress.

The above case, however, relates to a private corporation whereas the instant case involves a public utility engaged in the furnishing of illuminating and heating gas to the general public in the state of Wisconsin. The total franchise area served exceeds five hundred square miles. The total population of the area is nearly eight hundred thousand. The number of customers exceeds two hundred thousand, all within the state of Wisconsin. Congress has no power to question the states' control over their utilities. That power rests with the states. The states exercise such powers on the theory that

the utilities are state agencies. They perform functions which the states might perform directly rather than through agencies to which they delegate their own powers. Under a proper interpretation of the federal act, the state is still sovereign in the field covered by the public utility anti-strike law. The federal act makes provision for national emergencies, but it does not and cannot legislate in the field of local emergencies.

The *O'Brien case, supra,* was considered by this court in defendant's motion for rehearing in *United G., C. &. C. Workers* v. *Wis. E. R. Board, supra,* wherein the constitutionality of the public utility anti-strike law was first questioned.

In the case *In Re New Jersey Bell Telephone Co.* (October 2, 1950), 26 LRRM 2585, it was held that the New Jersey public utilities disputes act, which forbids those strikes against public utilities which might imperil health and welfare, does not conflict with provision in Labor-Management Relations Act which establishes emergency-strike procedure for disputes affecting national safety and health, since federal law does not authorize federal government to intervene in emergencies of state-wide proportions only and there is nothing in federal law forbidding intervention by states in such situations. The telephone company relied on the *O'Brien case, supra,* and the New Jersey Supreme Court stated:

> "In that case the constitutionality of the strike vote provision of the Michigan labor mediation law was questioned: The Union had struck against a private industrial organization, engaged in interstate commerce, without conforming to the prescribed state procedure; the state procedure differed from that provided in the Federal legislation and the court decided that because of the conflict the state statute was unconstitutional. The Court said that the regulation of the right to peacefully strike for higher wages had been preempted by Congress, but the case being decided by the Court involved a statute regulating the right to strike against private industry. It was not a statute such as the New Jersey statute, in which a state, in the exercise of its sovereignty, seeks to maintain without interruption the supply of services, considered essential to the welfare and health of its people, being furnished by a public utility, operating under a franchise by the state, whose services furnished are primarily intra-

state. It is significant that in the *O'Brien case, supra,* the court said 'Even if some legislation in this area could be sustained, the particular statute before us could not stand. For it conflicts with the Federal Act.' Our examination of the Federal Act discloses no provision therein which prohibits a state, in the exercise of its police power, from protecting itself against strikes or lockouts in public utilities which would imperil the health and safety of its citizens. It is noted that the Labor-Management Relations Act, 1947, in Sections 206-210, authorizes the Federal Government to proceed, pursuant thereto, to enjoin threatened strikes or lockouts which, if permitted to occur, might imperil the national health or safety. We find no authority in the Federal Act for the Federal Government to so act to prevent similar emergencies which may be state-wide only and which may be of insufficient magnitude to imperil the national health and safety. Since we find no provision in the Federal Act prohibiting a state from enjoining threatened strikes or lockouts in public utilities which, if permitted to occur, might imperil the health, welfare and safety of its people in an emergency of state-wide proportions only, since the Federal Act does not authorize the Federal Government to act in such cases, and since the 'intention of Congress to exclude the states from exerting their police power must be clearly manifested,' *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, 86 L. ed. 1154 [10 LRR Man. 520] we conclude that the right of the states to prohibit strikes or lockouts in this sphere has not been preempted by Congress, and that the *O'Brien case, supra,* is inapplicable to the present situation."

We concur with the New Jersey Supreme Court that the power still resides in the states in a proper case to prohibit strikes notwithstanding the existing federal legislation. We consider this a "proper case" within the foregoing statement and find nothing in the *O'Brien case, supra,* of a dissuasive nature. We hold that the public utility anti-strike law does not conflict with any federal act.

By the Court.—Judgment affirmed.